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Tat Berjasa Enterprise v Seginas (M) Sdn Bhd

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HIGH COURT (JOHOR BAHRU) — SUIT NO JA-22NCVC-5–01 OF 2017
CHOO KAH SING JC
1 APRIL 2018

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Contract — Oral agreement — Existence of oral agreement — Plaintiff to undertake and complete construction works — Defendant to pay agreed profit sum together with money advance by plaintiff for completion of works — Whether there was in existence oral agreement between plaintiff and defendant — Whether plaintiff entitled to claim for outstanding sum — Whether plaintiff entitled to claim for agreed profit

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Evidence — Burden of proof — Discharge of — Plaintiff alleged that there was oral agreement between plaintiff and defendant — Whether plaintiff discharged burden in proving that there was oral agreement entered into between parties — Whether plaintiff discharged burden in proving that plaintiff spent substantial amount to complete project — Whether plaintiff discharged burden in proving that plaintiff was not paid for its expenses

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The present action was based on an oral agreement allegedly entered between the parties wherein the defendant made an offer to the plaintiff to undertake and complete the construction works in a project ('the project') awarded by Jabatan Kerja Raya ('JKR') on condition that the plaintiff shall advance its resources and money to complete the works. In consideration, the defendant shall pay to the plaintiff an agreed profit sum of RM750,000 together with the money which the plaintiff had advanced for the completion of the works. The plaintiff contended that it had incurred or advanced a sum of RM1,045,743.74 for the project but the defendant had only paid a total sum of RM614,800. Hence, the plaintiff brought the present action to claim for the outstanding sum amounting to RM430,943.74 together with the agreed profit of RM750,000 from the defendant. The defendant denied the claim and put the plaintiff's claim to strict proof. The defendant's case was that the defendant was involved in the project, but the project did not involve the plaintiff. The defendant further denied that there was any oral agreement entered into between the parties. In the present action, the plaintiff relied on the evidence of the plaintiff's owner ('PW1') and a friend of PW1 ('PW2') whereas the defendant relied on the evidence of the defendant's directors ie DW1 and NoorZail Falilawati. The plaintiff had also adduced and relied on the following documents: (a) 'Account Opening Application Form for

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Business/Company/Association/Others' ('the application form'); (b) 'Specimen Signature Form' ('the specimen form'); (c) two Hong Leong Bank cheques ('the HLB cheques') belong to the defendant and were made payable to the plaintiff; and (d) the third parties' invoices addressed to the plaintiff. It ought to be noted that DW1 admitted that the defendant company had passed a resolution ('the resolution') to open the account at the CIMB Islamic, Kluang Branch and named PW1, PW2 and the defendant's directors as the authorised signatories to operate the said account.

Held, allowing the plaintiff's claim in part with costs of RM15,000 and ordering the defendant to pay the plaintiff the sum of RM430,943.74 and interest at the rate of 5%pa based on the judgment sum to be calculated from the date of the decision until the date of full settlement:

(1) The defendant did not offer any explanation as to why the defendant's directors signed the application form and the specimen form together with PW1 and PW2 if not for the plaintiff to secure payments from the defendant. Further, the defendant did not challenge the authenticity and contents of the resolution. The fact that PW1 was a signatory to the defendant's account showed it was more probable than not that the plaintiff at some point in time had a relationship with the defendant. Based on the above evidence and contemporaneous documents, the court was satisfied that the plaintiff had, on balance of probability, discharged its burden in proving that there was an oral agreement entered into between the parties, and that the plaintiff did spend a substantial amount to complete the works in the project, and the plaintiff was not paid for its expenses (see paras 9, 14, 19, 22 & 25).

(2) The documentary evidence did not support the defendant's case. The explanation provided by DW1 was preposterous and could not explain coherently as to why the documentary evidence existed. The defendant's defence was in substance a bare denial (see para 25).

(3) Notwithstanding the above findings, the court was not inclined to allow the plaintiff's claim for the agreed profit of RM750,000. Other than what had been said by the plaintiff's witnesses, no evidence was adduced to support that the project had been completed, and that the defendant had been fully paid by JKR. The plaintiff did not prove that the defendant was paid for the project for which the plaintiff was entitled to the agreed profit (see para 26).

[Bahasa Malaysia summary

Tindakan ini berdasarkan perjanjian lisan yang dikatakan telah dimasuki antara pihak-pihak di mana defendan telah membuat tawaran kepada plaintif untuk menjalani dan menyiapkan kerja-kerja pembinaan dalam suatu projek ('projek tersebut') yang telah diawardkan oleh Jabatan kerja Raya ('JKR')

dengan syarat bahawa plaintif hendaklah mendahulukan sumber dan wangnya untuk menyiapkan kerja tersebut. Sebagai balasan, defendan hendaklah membayar kepada plaintif keuntungan yang dipersetujui sejumlah RM750,000 bersama wang yang telah didahulukan oleh plaintif untuk menyiapkan kerja tersebut. Plaintif berhujah bahawa ia telah menanggung atau mendahulukan sejumlah RM1,045,74374 untuk projek tersebut tetapi defendan telah hanya membayar baki tertunggak sejumlah RM430,943.74 bersama keuntungan yang dipersetujui berjumlah RM750,000 daripada defendan. Defendan menafikan tuntutan itu dan memohon tuntutan plaintif menunjukkan bukti. Kes defendan adalah bahawa defendan telah terlibat dalam projek tersebut tetapi projek tersebut tidak melibatkan plaintif. Defendan selanjutnya menafikan bahawa terdapat apa-apa perjanjian lisan telah dimasuki antara pihak-pihak. Dalam tindakan ini, plaintif bergantung kepada keterangan pemilik plaintif (PW1') dan seorang kawan PW1 ('PW2') manakala defendan bergantung kepada keterangan pengarah-pengarah defendan iaitu DW1 dan NoorZail Falilawati. Plaintif juga telah mengemukakan dan bergantung kepada dokumen-dokumen berikut: (a) 'Account Opening Application Form for Business/Company/Association/Others' ('borang permohonan'); (b) 'Specimen Signature Form' ('borang spesimen'); (c) dua cek Hong Leong Bank ('cek-cek HLB') milik defendan dan dibuat untuk dibayar kepada plaintif; dan (d) invois-invois phak ketiga yang dialamatkan kepada plaintif. Ia patut ditekankan bahawa DW1 telah mengakui bahawa syarikat defendan telah meluluskan ketetapan/resolusi ('ketetapan/resolusi') untuk membuka akaun di CIMB Islamic, Cawangan Kluang dan menamakan PW1, PW2 dan pengarah-pengarah defendan sebagai penandatangan yang diberi kuasa untuk menguruskan akaun tersebut.

Diputuskan, membenarkan sebahagian daripada tuntutan plaintif dengan kos RM15,000 dan memerintahkan defendan untuk membayar plaintif sejumlah RM430,943.74 dan faedah pada kadar 5% setiap tahun berdasarkan jumlah penghakiman dikira dari tarikh keputusan sehingga tarikh penyelesaian penuh:

(1) Defendan tidak memberikan apa-apa penjelasan sebab kenapa pengarah-pengarah defendan telah menandatangani borang permohonan dan boring specimen bersama PW1 dan PW2 jika bukan untuk plaintif menjamin bayaran daripada defendan. Selanjutnya, defendan tidak mencabar ketulenan dan kandungan ketetapan/resolusi itu. Hakikat bahawa PW1 adalah penandatangan kepada akaun defendan menunjukkan ia lebih berkemungkinan dari tidak yang plaintif pada satu masa mempunyai hubungan dengan defendan. Berdasarkan keterangan dan dokumen sedia ada di atas, mahkamah berpuas hati bahawa plaintif telah, atas imbangan kebarangkalian, melepaskan beban buktinya bahawa terdapat perjanjian lisan yang dimasuki antara pihak-pihak, dan bahawa plaintif telah membayar jumlah yang besar

untuk menyiapkan kerja dalam projek tersebut, dan plaintif tidak dibayar untuk perbelanjaannya (lihat perenggan 9, 14, 19, 22 & 25).

(2) Keterangan dokumentar tidak menyokong kes defendan. Penjelasan yang diberikan oleh DW1 adalah tidak munasabah dan tidak boleh menjelaskan sebab keterangan dokumentar itu wujud. Pembelaan defendan hanyalah penafian semata-mata (lihat perenggan 25).

(3) Walau apa pun penemuan di atas, mahkamah tidak cenderung untuk membenarkan tuntutan plaintif bagi keuntungan yang dipersetujui sejumlah RM750,000 itu. Selain daripada apa yang dikatakan oleh saksi-saksi plaintif, tiada keterangan telah dikemukakan untuk menyokong projek tersebut telah siap, dan bahawa defendan telah dibayar penuh oleh JKR. Plaintif tidak membuktikan bahawa defendan telah dibayar untuk projek tersebut yang mana plaintif berhak terhadap keuntunan yang dipersetujui (lihat perenggan 26).]

Notes

For cases on discharge of burden of proof, see 7(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 808–809.

For cases on existence of oral agreement, see 3(4) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 6665–6672.

Mohd Asmadi (Noraizalian Ghazali with him) (Aizalian Asmadi & Co) for the plaintiff.

Suzana Farikah (Suzana Farikah & Co) for the defendant.

Choo Kah Sing JC:

INTRODUCTION

[1] The plaintiff's claim is based on an oral agreement entered into between the plaintiff and the defendant. In broad terms, the oral agreement was that the defendant made an offer to the plaintiff to undertake and complete the construction works in a project known as 'Cadangan Pembaikan dan Naiktaraf Kemudahan Fasiliti/Sukan di Sekolah Sukan Tunku Ismail (SSTMI), Bandar Penawar, Johor (Fasa 1)' ('the project') on condition that the plaintiff shall advance its resources and money to complete the works. In consideration of the plaintiff fulfilling its obligations, the defendant shall pay the plaintiff an agreed profit sum of RM750,000 together with the money which the plaintiff has advanced for the completion of the works.

[2] The parties have gone through a full trial. On 27 February 2018, this court allowed the plaintiff's claim in part. The reasons for the decision are set out as below.

BRIEF FACTS

[3] On 6 September 2013, Jabatan Kerja Raya ('JKR') awarded the project to the defendant based on the defendant's tendered sum of RM11,076,978.40. The duration to complete the works was 12 months, ie from 23 September 2013–21 September 2014.

[4] The plaintiff's narrative was that sometime in 2013 after JKR had awarded the project to the defendant, the defendant's representative, Encik Jamal Abd Nasir bin Makhtar ('DW1'), a director of the defendant company, approached one Harip bin Jailani ('PW2'). PW2 is a friend of Mokhtar bin Samad ('PW1') who is the owner of the plaintiff company.

The defendant through DW1 offered the plaintiff to be a subcontractor of the project provided that the plaintiff should advance and use its own money to complete the works. In consideration of that, the defendant agreed to pay the plaintiff an agreed profit sum of RM750,000 together with the money which had been advanced by the plaintiff to complete the works. The plaintiff accepted the offer. The plaintiff appointed PW2 as the project manager to oversee the progress of the works in the said project.

[5] The defendant also offered to open a joint account with the plaintiff in CIMB Bank, Kluang Branch, for the joint effort as security for payments to the plaintiff. However, the parties could not open a joint account because DW1, as representative from the defendant company, faced some regulatory problems in opening and operating new bank accounts. The defendant then offered its existing bank account with Hong Leong Bank to be used for the same purpose, and appointed PW1, as representative from the plaintiff company, to be a signatory to operate the said account. Later, PW1 was removed as a signatory to the said account without his knowledge.

[6] According to the plaintiff, the plaintiff had incurred or advanced a sum of RM1,045,743.74 for the project. Thus far, the defendant had progressively paid the plaintiff a total sum of RM614,800. There is still an outstanding sum of RM430,943.74 owing to the plaintiff by the defendant. Hence, the plaintiff claims against the defendant, inter alia, the sum of RM430,943.74 and the agreed profit of RM750,000 from the defendant.

[7] The defendant's narrative was that the defendant was involved in the project, but the project did not involve the plaintiff. The defendant denied that there was any oral agreement entered into between the defendant and the plaintiff. The plaintiff also denied that the defendant had any dealings with the plaintiff. In the defendant's statement of defence, simply put, the defendant denied the claim and put the plaintiff's claim to strict proof.

A THE FINDING OF THIS COURT

[8] The agreed issues to be tried are as follows:

1. Sama ada wujudnya ikatan kontrak di antara Plaintif dan Defendan untuk melaksanakan projek Cadangan Pembaikan dan Naiktaraf Kemudahan Fasiliti/Sukan di Sekolah Sukan Tunku Ismail (SSTMI), Bandar Penawar, Johor (Fasa 1).

2. Sama ada wujudnya ikatan kontrak di antara Defendan dan Plaintif untuk defendan membuat bayaran keuntungan kepada plaintif sebanyak Ringgit Malaysia Tujuh Ratus Lima Puluh Ribu (RM750,000) sahaja daripada projek tersebut.

3. Sama ada Defendan masih berhutang kepada Plaintif baki wang kos dan perbelanjaan projek tersebut sebanyak Ringgit Malaysia Empat Ratus Tiga Puluh Ribu Sembilan Ratus Empat Puluh Tiga dan Tujuh Puluh Empat Sen (RM430,943.74) sahaja.

[9] After having scrutinised the oral and documentary evidence of the plaintiff's case, this court is satisfied that the plaintiff has discharged its burden of proof on a balance of probabilities. This court has taken into consideration of the evidence below to come to its conclusion.

[10] First, the plaintiff adduced two documents entitled 'Account Opening Application Form for Business/Company/Association/Others' ('application form') and 'Specimen Signature Form' ('specimen form') which belonged to CIMB Bank (see pp 9–12 and p 13 respective exh 'B' — Ikatan Dokumen Plaintif).

[11] The named applicant in the application form was the defendant company. The proposed signatories of the intended account holders were NoorZail Falilawati bt Md Nor, PW1, PW2 and DW1 (see p 11 exh 'B'). All the intended account holders had placed their signatures on the application form.

[12] The authorised signatories for operating the intended account were NoorZail Falilawati bt Md Nor, SP1 and DW1. They had placed their signatures in the specimen form as well. It is observed that NoorZail Falilawati is a director and shareholder of the defendant company.

[13] It was explained by PW1 that the intended account was part of the oral agreement in that it was meant to be a security to secure payment to the plaintiff.

[14] There was no evidence in the defendant's case to challenge or to suggest

that the signatures of DW1 and NoorZail Falilawati were not theirs or were forged. In fact, DW1 admitted that those two documents were documents meant for opening of an account for the defendant company (see Q&A 9 — DW1-WS). However, the defendant did not explain as to why the defendant wanted to open an account. The defendant also did not explain as to why PW1 and PW2 were involved in the opening of a new account for the defendant company. The defendant did not offer any explanation as to why DW1 and NoorZail Falilawati signed those documents together with PW1 and PW2 if not for the plaintiff to secure payments from the defendant.

[15] DW1 admitted that the defendant company had passed a resolution ('the resolution') (see p 8 exh 'B') to open the intended account at the CIMB Islamic, Kluang Branch (see Q&A 9 — DW1-WS). The resolution allowed the defendant company to open an account at CIMB Islamic, Kluang Branch and named PW1 and PW2 as authorised signatories (as Group B) to operate the intended account together with DW1 and NoorZail Falilawati (as Group A). Further, the intended account was to be operated by one signatory from Group A and any one signatory from Group B. The resolution was passed on 2 October 2013 and signed by DW1 and NoorZail Falilawati.

[16] The defendant did not challenge the authenticity and the contents of the resolution. Likewise, the defendant did not challenge the signatures on the resolution.

[17] The defendant's counsel submitted that the information in the application form and specimen form are incomplete, undated and it was not acknowledged by the bank, therefore, the court should not rely on them. Further, the defendant's counsel also submitted that those documents could not establish there was any contractual relationship between the plaintiff and the defendant.

[18] After having examined the application form, specimen form and resolution and the testimonies of the plaintiff's witnesses as well as the defendant's witness, this court is satisfied that the documents can be relied upon as credible evidence in the plaintiff's case. As explained by PW1, he could not open the account with CIMB Bank because DW1 was facing some problem in opening and operating a new bank account. That explains why the documents were not submitted and there was no acknowledgement from the bank. Despite the fact that the application form and specimen form were undated, that did not negate the fact that the information stated therein was detailed enough to suggest the defendant company had intended to open a new account at some point in time. Further, the defendant did not deny that the defendant's stamp was placed on the two documents. In fact, the information provided in the two forms was sufficient to open a bank account at any point

of time (if attached with those documents as required by the bank).

[19] This court did not just rely on the application form, specimen form and resolution to conclude that there was an oral agreement between the two parties. This court has also considered other evidence which will be unfold gradually in the following discussion.

[20] Secondly, the plaintiff had adduced two Hong Leong Bank cheques ('the HLB cheques') (see pp 27 and 33 exh 'B'). The account holder of these HLB cheques belong to the defendant company. The HLB cheques were made payable to the plaintiff. The signatories in the HLB cheques were SP1 and DW1. Why was PW1 a signatory to the defendant's account, and why did the defendant have to pay the plaintiff? The defendant through DW1 explained and stated as follows:

Q. 29	Rujuk Ms 27, 33 and 35. Kenapa ada cek bayaran kepada Tat Berjasa daripada Seginas?
A.	Cek ini ditandatangai untuk projek ini tetapi diarahkan oleh sub-con saya ANIKA SDN BHD untuk bayaran terus dibuat kepada Tat Berjasa, walaubagaimanapun saya tidak kenal Tat Berjasa tersebut, bayaran dibuat untuk urusan ANIKA SDN BHD dan Tat Berjasa.
Q. 30	Adakah encik kenal plaintiff encik Moktar?
A.	Saya kenal dan manjadi orang tengah antara RADEN ENTP dan ANIKA SDN BHD, dan sebagai penandatangan cek bagi projek ini.
Q. 31	Adakah encik kenal Tat Berjasa dan biasa berurusan?
A.	Tidak kenal dan tidak berurusan.

[21] The defendant stated that the reason why PW1 was made a signatory to the defendant's account was because the plaintiff was a middle party for two entities. This explanation could not be probable because no person with a right frame of mind would simply allow a stranger to be a signatory to its bank account just to facilitate its subcontractor ANIKA SDN BHD's wishes. The defendant's explanation was incoherent, the more so when DW1 alleged that he had no dealings with the plaintiff. The defendant did not call any witness either from ANIKA SDN BHD or RADEN ENTP to give evidence in support of its narrative.

[22] The plaintiff's narrative was that the defendant had agreed that for one of its existing accounts to be used as security for payment to the plaintiff. As such, the plaintiff's representative PW1 was made an authorised signatory in the defendant's account. Thus far, the HLB cheques supported the plaintiff's

narrative that its payments will be secured by allowing PW1 to be a signatory in the defendant's account after the attempt to open a new account was unsuccessful. The fact that PW1 was a signatory to the defendant's account shows it is more probable than not that the plaintiff at some point in time had a relationship with the defendant. It was more probable than not that the relationship between the parties was that the plaintiff was appointed as a subcontractor in the project by the defendant. It was probable that the reason as to why PW1 was a signatory in the defendant's account was that it was meant to secure payment from the defendant in the project. The documentary evidence seems to be more favourable to and supportive of the plaintiff's narrative than the defendant's narrative.

[23] Thirdly, the plaintiff claimed for a sum of RM430,943.74 which was the outstanding balance sum that the plaintiff had incurred. This amount was made up of the sum of money that the plaintiff had paid to third parties. The plaintiff had adduced the third parties' invoices addressed to the plaintiff. All the materials supplied by these third parties were delivered to the project site. For example, the invoice of KMYA dated 15 April 2014 was invoiced to the plaintiff, the material (*pasir sedang*) was delivered to Sek Sukan, Bandar Penawar, Kota Tinggi (see p 79 exh 'B'). Other invoices were loose items purchased by the plaintiff, payments made to hire machineries, lorry and etcetera. DW1 had denied that the defendant had any dealings with all the third parties. This court is not satisfied with the DW1's denial of its involvement with these third parties. These third parties had dealt with the plaintiff because the plaintiff was the subcontractor who had purchased materials or hired the services from these third parties. Obviously, there were no direct dealings between the defendant and the third parties. However, from the invoices, there is evidence that the materials or machineries hired were delivered and used at the project site. The project site was managed by the defendant. Hence, the defendant's denial was unsustainable.

[24] Fourthly, DW1 testified that the defendant made payments to the plaintiff in this project because it was directed by its subcontractor Anika Sdn Bhd to pay direct to the plaintiff. DW1 was referring to the HLB cheques and another Hong Leong Bank cheque 271545 dated 25 July 2014 for a sum of RM50,000 (see p 35 exh 'B'). There was no documentary evidence to support the defendant's story.

[25] Based on the above evidence and contemporaneous documents, this court is inclined to accept the plaintiff's narrative as being more probable than just possible compared with the defendant's narrative. Hence, this court is satisfied that the plaintiff had, on a balance of probability, discharged its burden in proving that there was an oral agreement entered into between the parties, and that the plaintiff did spend a substantial amount to complete the

works in the project, and the plaintiff was not paid for its expenses. With regard to the defendant's story, the documentary evidence does not support the defendant's case. The explanation provided by DW1 is preposterous and could not explain coherently as to why the documentary evidence existed. The defendant's defence was in substance a bare denial.

[26] Notwithstanding the above, this court is not inclined to allow the plaintiff's claim for the agreed profit of RM750,000. Other than what has been said by the plaintiff's witnesses, no evidence was adduced to support that the project has been completed, and that the defendant had been fully paid by JKR. The plaintiff did not prove that the defendant was paid for the project for which the plaintiff is entitled to the agreed profit.

CONCLUSION

[27] Based on the above reasoning, this court ordered that the defendant to pay the plaintiff the sum of RM430,943.74, and interest at the rate of 5%pa based on the judgment sum to be calculated from the date of the decision (27 February 2018) until the date of full settlement. This court also ordered the defendant to pay costs of RM15,000 to the plaintiff.

Plaintiff's claim allowed in part with costs of RM15,000; defendant ordered to pay plaintiff the sum of RM430,943.74 and interest at the rate of 5%pa based on the judgment sum to be calculated from the date of the decision until the date of full settlement.

Reported by Dzulqarnain Ab Fatar